

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

RAY CAMMACK SHOWS, INC.
4950 W. Southern
Laveen, AZ 85339

Employer

Docket No. 02-R4D4-9240

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by Ray Cammack Shows, Inc. (Employer).

JURISDICTION

On September 24, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Employer at 1101 W. McKinley Avenue, Pomona, California (the site).

On November 30, 2001, the Division issued to Employer a citation, alleging a serious violation of section 3203(a)(4) [Injury and Illness Prevention Program] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.¹ A civil penalty of \$18,000 was proposed for the violation.

On January 8, 2003, Employer's attorney initiated Employer's appeal by phone. On January 17, 2002, the attorney submitted a completed appeal form with an explanation for the late filing of the appeal, a "Declaration of Good Cause" and a request that an extension of time be granted to allow for the filing of the appeal.

On May 31, 2002, the Appeals Board sent a letter to Steven Honjio, District Manager for the Division, asking him to respond within ten days

¹ Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

regarding any comments the Division might have concerning the explanation for the late filing of Employer's appeal. District Manager Vicky Albano replied in a letter dated June 19, 2002 with the Division's comments and an objection to the appeal as untimely.

On February 7, 2003, the Appeals Board issued an Order Denying Late Appeal finding that good cause did not exist for filing a late appeal. Employer filed a petition for reconsideration on March 11, 2003.

EVIDENCE

No hearing has been held in this matter. The Board relies upon its independent review of the record in this case including the pleadings and correspondence submitted by each party and the citation.

In this case, Employer's representative admits that the citation was received in its office on December 5, 2001, making December 27, 2001, the deadline to file an appeal. Employer's representative initiated the appeal by telephone on January 8, 2002, 12 days late.

Employer contends that good cause exists for filing a late appeal because they are a traveling carnival business that serves various fairs within the State of California where their working season runs from February through October. During the season they work full time every day without any vacations. Their staff comes from all over the United States and gathers each year for the fair season. Once the season is over they return to their homes and/or go on vacations. Employer contends that their attorney Boyd F. Jensen II, of Garrett & Jensen (Jensen), was forced to file a late appeal of the citation due to the unavailability of Guy Leavitt, President of the company. During the appeal period, Jensen could not confer with Charlene or Guy Leavitt regarding the appeal and was not authorized to appeal citations without their express approval. During the first week of December 2001, the Leavitts were out of the state. They were in Las Vegas, Nevada firming up business plans for the next fair season.

Immediately following these meetings, the Leavitts went on vacation. This is the only vacation period they have during the year. The Christmas holidays immediately follow their vacation where the office is essentially closed. They went with their grandchildren to Telluride, Colorado from December 27, 2001 to January 3, 2002.

Upon their return from Colorado they received a message from their attorneys, Garrett & Jensen, but did not speak to them until January 7, 2002,

at which time it was agreed that they would appeal the citation. Garrett & Jensen contacted the Appeals Board on January 8, 2002 to appeal the citation.

ISSUE

Has Employer established good cause for filing a late appeal?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

Labor Code section 6319 states that an “employer has 15 working days from receipt of the notice [of citation] within which to notify the appeals board that he or she wishes to contest the citation or order...”

Title 8, California Code of Regulations, section 359 states:

- a) Except as provided in Section 361.1(b), an appeal shall be deemed filed on the date a communication indicating a desire to appeal the Division action is hand delivered, mailed to, or received by the Appeals Board in Sacramento, California, whichever is earlier. No particular format is necessary to institute the appeal.
- b) The time for filing any appeal may be extended or a late filing permitted upon a written showing of good cause that contains sufficient facts to show or establish a reasonable basis for the late filing.
- c) A request to file a late appeal shall be accompanied by a declaration containing a statement that any facts therein are based upon the personal knowledge of the declarant.

In this case, there is no dispute that on December 5, 2001, Employer’s legal representative received the citation issued by the Division. Employer essentially contends that its absence during the month of December and into January due to vacation, holidays, and the company's seasonal closure rendering the company's president unreachable, establishes good cause for extending the statutory time period for filing its appeal.

We held in *Timothy J. Kock*, Cal/OSHA App. 01-9135, Denial of Petition for Reconsideration (Nov. 20, 2001) at pg. 3, that “...appeals to the Board should be pursued by the appealing party with the degree of care a reasonably prudent person would undertake in dealing with his or her most important legal affairs.”

In this case, Employer was well aware of its seasonal closure and absence due to planned vacations and the holidays during the month of December and into early January. The intentional seasonal closure of the business, the planned absence of the principles from their business rendering themselves unreachable to its legal representative knowing that its attorney was not authorized to file an appeal without express approval of the absent president reveal actions by Employer which do not comport with the degree of care a reasonably prudent person would undertake in dealing with his or her most important legal affairs. While its legal representative was apparently authorized to receive the citation issued by the Division, the record reveals no steps taken by Employer to insure that the president could be reached or that periodic communication could occur with its attorney during the planned absence of the company's president.²

We have recognized that it "is the appellant's obligation to put procedures into place that will ensure that important documents it receives are processed in a timely manner." (*Jesse Aguirre, Farm Labor Contractor*, Cal/OSHA App. 93-9013, Denial of Petition for Reconsideration (June 10, 1993) at pg. 2.) Here, Employer took no steps to insure that any citation received by its legal representative regarding a known, unresolved investigation by the Division would be processed (appealed) in a timely manner. Rather than take appropriate steps to protect its interests, Employer's principles chose to be unreachable to Jensen which impeded Employer's ability to pursue an appeal.

If we were to accept Employer's position that it is permissible to put off filing appeals during a planned vacation period, or off-season, where would we draw the line? Would we now have to allow late filings in agricultural cases that may have an even longer off-season? In the absence of a showing of good cause, fair administration of rules requiring prompt filing of appeals from citations dictate that all employers who are subject to the same rules be similarly treated. In light of the obvious and considerable problems that adoption of employer's position would entail, we choose to adhere to our long standing policy of not accepting late filed appeals in cases which involve a breakdown or failure in internal operating procedures.

As we have noted several times in the past, *Kaweah Construction Company*, Cal/OSHA App. 87-9005, Denial of Petition for Reconsideration (Mar. 5, 1987) is the Board's seminal case on good cause when the proffered excuse is that the citations did not timely reach the desk of the appropriate

² Charlene Leavitt, Employer's Vice-President, states in a declaration that her and her husband were on vacation after their business trip to Las Vegas, Nevada after which the Christmas holidays followed when the office is essentially closed. They left for a family ski trip to Telleride, Colorado from December 27, 2001 to January 3, 2002. Upon returning, she received messages from their attorney but was not able to speak with them until January 7, 2002. These facts indicate that communication was not made until after the appeal period expired.

party. In *Kaweah Construction Company*, the employer asserted it did not file a timely notice of appeal because its field engineer did not tell any supervisor that citations were received and the notice of civil penalty got “lost in the paper shuffle before reaching the President’s desk.” (*Kaweah, supra*, at p. 2.) The Board determined that when a document is lost in the paper shuffle in an office, and an untimely notice of appeal results, no good cause exists to justify an extension. (*Ibid.*)

Since *Kaweah*, the Board has consistently held that when a notice of appeal is untimely filed because of internal operating procedures good cause does not exist. (See, *Laselco Pacific*, Cal/OSHA App. 96-9084, Denial of Petition of Reconsideration (July 16, 1996) [citations directed to president of company who was on extended business trip]; *Del Monte Glass, Inc.*, Cal/OSHA App. 87-9009, Denial of Petition of Reconsideration (May 7, 1987) [paperwork sent to the company did not “arrive in proper hands” until too late]; *Cleveland Wrecking Company*, Cal/OSHA App. 92-9054, Denial of Petition of Reconsideration (Nov. 18, 1992) [branch manager did not properly handle citation]; and *Jesse Aguirre, Farm Labor Contractor, supra*, [appeal misplaced during move of its office].)

Like the cases cited above, this case presents an example of a failure of an employer’s internal operating procedures. Under the facts presented in this case, we believe that we are properly exercising the discretion vested in the Board by insisting on timely appeals and find that Employer has not established good cause for filing an untimely appeal.

DECISION

The Board affirms its Order dated February 7, 2003 denying Employer’s late appeal.

MARCY V. SAUNDERS, Member
GERALD PAYTON O’HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: April 30, 2003